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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN ZICHKO,

Defendant and Appellant.

2d Crim. No. B209601
(Super. Ct. No. F311715)
(San Luis Obispo County)

Robert Zichko was committed to a state hospital after being found not guilty of a felony offense by reason of insanity. (Pen. Code, § 1026, subd. (a).)¹ He appeals the judgment and order extending his commitment, contending that the trial court violated his due process rights by allowing his counsel to waive a jury trial over his objection. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2004, Zichko was found not guilty of making a criminal threat (§ 422) by reason of insanity. (§ 1026.) He was committed to a state mental hospital.

In January 2006, the district attorney filed a petition to extend Zichko's commitment. (§ 1026.5, subd. (b).) After an April 2006 trial, the court extended the commitment for two years ruling that, based on his mental disorder, Zichko continued to

¹ All statutory references are to the Penal Code.

represent a substantial danger of physical harm to others. (§ 1026.5, subd. (b)(1).) Zichko appealed the order contending that the trial court violated his due process rights by accepting a jury waiver by counsel over his personal objection. Relying on *People v. Powell* (2004) 114 Cal.App.4th 1153, this court affirmed the recommitment order in an unpublished opinion. (*People v. Zichko* (Aug. 15, 2007, B192933).)

In January 2008, the district attorney filed a second petition to extend Zichko's commitment. Again, Zichko's defense counsel waived a jury, and Zichko objected to the waiver. Relying on *Powell*, the trial court ruled that the jury waiver by counsel was proper.

At trial, psychiatrist David Fennel testified that, based on his review of the records, Zichko suffered from schizophrenia, paranoid type, and that Zichko posed a substantial danger of physical harm to others by reason of his mental condition, especially in an unstructured setting which permitted him to stop taking his medication. Dr. Fennel testified that Zichko had a fixed delusional system including a false belief that he had a wife and child. Dr. Fennel concluded that, without medication, Zichko is hostile, irritable and very intrusive with others.

Zichko testified on his own behalf that he does not need further treatment and hospital staff was overmedicating him for financial gain. He also testified that Dr. Fennel perjured himself, a recent medical report was a "big lie," and a character in a movie could confirm his story about having a wife.

The trial court recommitted Zichko for further psychiatric treatment, finding beyond a reasonable doubt that Zichko suffers from a mental condition, and continues to present a substantial danger to others.

DISCUSSION

Zichko contends that the trial court erred by accepting the jury waiver by counsel over his objection. In *Powell*, we held that "counsel may waive jury trial over objection of his or her client in a 'not guilty by reason of insanity' commitment extension trial." (*People v. Powell, supra*, 114 Cal.App.4th at p. 1156.) Zichko concedes that

Powell is directly on point, but argues that *Powell* is no longer good law in light of the recent case of *People v. Allen* (2008) 44 Cal.4th 843. We disagree.

A person committed to a state hospital after having been found not guilty of a felony by reason of insanity (NGI) may be recommitted if the court finds that "by reason of a mental disease, defect, or disorder [the person] represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1).) An NGI commitment extension trial "shall be by jury unless waived by both the person and the prosecuting attorney. . . ." (*Id.*, at subd. (b)(4).) A jury waiver in a criminal case requires the defendant's personal consent, but a jury can be waived in a civil proceeding in the manner prescribed by statute. (*People v. Montoya* (2001) 86 Cal.App.4th 825, 829.) An NGI extension trial is a civil proceeding and section 1026.5, subdivision (b) does not require a defendant's personal consent to a jury trial waiver. (See *People v. Powell, supra*, 114 Cal.App.4th at pp. 1157-1158.)

In holding that defense counsel can waive a jury even over the objection of the defendant, we reasoned that an insane person who is a substantial danger of physical harm to others "should not be able to veto the informed tactical decision of counsel" to waive jury. (*People v. Powell, supra*, 114 Cal.App.4th at p. 1158.) As in *Powell*, the evidence in the instant case shows that Zichko has been adjudged to be insane and has not regained his sanity. Such a person cannot intelligently invoke or waive the right to jury trial, or even meaningfully understand who should make the determination of whether his commitment should be extended. (*Ibid.*; see also *People v. Otis* (1999) 70 Cal.App.4th 1174, 1177.)

Contrary to Zichko's contention, nothing in the *Allen* case is inconsistent with the holding and reasoning of *Powell*. In *Allen*, the California Supreme Court held that a defendant in a sexually violent predator (SVP) proceeding has a due process right to testify at trial despite counsel's decision he or she should not testify. (*People v. Allen, supra*, 44 Cal.4th at pp. 848, 870.) The court noted that the constitutional rights of criminal defendants do not apply in SVP proceedings because such proceedings are civil, but concluded that SVP defendants are entitled to due process protection because their

commitment involves a deprivation of liberty. (*Id.*, at pp. 860, 862; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80.)

In ruling that an SVP defendant had a due process right to testify at trial over counsel's objection, the court concluded that the testimony of a defendant is likely to relate to critical information, participation of the defendant in the proceedings through testimony enhances the reliability of the outcome, and denial of a right to testify might relegate the defendant to the role of a mere spectator without power to attempt to affect the outcome. (*People v. Allen, supra*, 44 Cal.4th at pp. 862-870.) The court emphasized that the "... fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." [Citation.]" (*Id.*, at p. 869, quoting *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Because denial of the right would substantially limit a defendant's ability to be heard, there is no justification for prohibiting the sworn testimony of the defendant who may be in the best position to meet the People's case. (*Ferguson v. Georgia* (1961) 365 U.S. 570, 582.)

Those concerns are not present when considering the issue of a jury waiver. First, the right to a jury trial is not at issue. *Powell* acknowledges that NGI extension defendants or others who have been involuntarily committed have the right to a jury trial. It only limits the manner in which it may be invoked or waived. The fact that the interests involved in involuntary commitment proceedings are fundamental enough to require jury trial and guarantee the defendant's right to be heard does not compel the conclusion that a jury trial cannot be waived by counsel even against the defendant's wishes. Here, Zichko retained the right to testify and to present all relevant evidence to a neutral trier of fact.

As *Powell* and other cases have explained, an insane or otherwise mentally impaired person may not be sufficiently competent to determine his or her own best interests. Although Zichko may have been lucid and capable of giving testimony under the questioning of counsel, there is no basis in the record that he was capable of making a reasoned decision about the relative benefits of a jury or court trial. Making this assessment requires the consideration of many factors, and experienced attorneys often

differ as to the advantages and disadvantages of trial by jury. (*People v. Acosta* (1971) 18 Cal.App.3d 895, 902.)

Furthermore, the rule that a jury may be waived by counsel over the client's objection in situations where the defendant is mentally impaired is well established in a variety of situations involving involuntary commitment. (*People v. Haynie* (2004) 116 Cal.App.4th 1224, 1229-1230 [NGI commitment proceeding]; *People v. Otis, supra*, 70 Cal.App.4th at p. 1177 [mentally disordered offender proceeding]; *People v. Montoya, supra*, 86 Cal.App.4th at p. 829 [same]; *People v. Masterson* (1994) 8 Cal.4th 965, 972 [competency proceeding]; *People v. Rowell* (2005) 133 Cal.App.4th 447, 451, 454 [sexually violent predator proceeding].) Our Supreme Court did not question or even refer to the holdings of these cases in *Allen*. Neither the record nor current judicial authority requires this court to reconsider its decision in *Powell*.

The judgment (order) is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

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